

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

DAIMLERCHRYSLER SERVICES NORTH  
AMERICA, LLC f/k/a MERCEDES-BENZ  
CREDIT CORPORATION, a Michigan limited  
liability company,

Plaintiff/Counter-Defendant,

-vs-

SUMMIT NATIONAL, INC.,  
an Illinois corporation,

Defendant/Counter-Plaintiff.

Case No. 02-71871  
Hon. Nancy G. Edmunds  
Magistrate Wallace Capel, Jr.

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**REPLY BRIEF IN SUPPORT OF  
MOTION IN LIMINE TO STRIKE SUPPLEMENTAL REPORT OF  
AND RELATED TESTIMONY FROM THOMAS FRAZEE  
PROOF OF SERVICE**

DCS's attempt to blame SNI for the late report should be rejected.

On February 13, 2004, SNI produced diskettes to DCS, along with the disclaimer that the 1997 and 1998 information was in DOS format and inaccessible. Nonetheless, this was the best that SNI could do; SNI simply did not keep this historic information in a better electronic form. The more recent information was in a QuickBooks program and was presumably accessible. *See SNI's Brief*, Exhibit E. DCS is therefore wrong when it states that SNI failed to inform DCS that some of the information "was corrupt...and could not be accessed." This is exactly what SNI did tell DCS about the older information. *See DCS's Brief*, Exhibit C for undersigned counsel's March 6, 2004 additional explanation regarding the DOS disk. SNI counsel had no idea that there was a problem with the more recent QuickBooks information, however, and neither did DCS's counsel.

The remainder of February, all of March, all of April, and most of May then passed.

On May 24, just four days before the expert report was due, DCS's counsel identified, for the first time, a concern with the more recent QuickBooks information (not with the 1997 and 1998 information). There is only one way to interpret this: Mr. Frazee waited until May 24 to start working on this project, and he assumed that it would take him, at the most, four days. Indeed, DCS's counsel confirmed in her May 24 letter that Mr. Frazee's report would be due June 1 (the extension agreed to by undersigned counsel), even knowing of the problem with the QuickBooks information. SNI counsel asked DCS counsel to identify her specific concerns.

Two days later, on May 26, DCS counsel identified some specific problems with the QuickBooks information. That day, SNI counsel had SNI deliver new disks by overnight delivery (SNI is in Chicago).

These were provided to Mr. Frazee on May 27. Mr. Frazee did not identify his need for a password on May 27 or 28 (nor did SNI counsel even know that a password was required). June 1 came and went. On June 7, DCS's counsel requested the password, and it was provided that same day. Twenty two days later, on the eve of his deposition, Mr. Frazee delivered his new report.

All else aside, the Court needs to know only one thing: the first time that DCS raised a concern about the QuickBooks information was on May 24. Mr. Frazee's report was due on May 28, then extended until June 1. *He delivered his report on June 29, one day before his deposition.* DCS also delivered certain documents that day, even though Mr. Frazee testified in his deposition that he had provided these documents to DCS earlier in the month. Exhibit A. If DCS's footnote one is accurate, DCS apparently decided to direct Mr. Frazee to wait until the last minute to start working, thereby taking the risk that its motions for summary judgment would not be granted. But even that excuse rings false: the Court issued its opinion denying DCS's motions on April 8, 2004. Mr. Frazee did not identify the need for better information for over six weeks after that.

DCS seeks to inflame the Court by asserting that SNI has kept bad internal accounting records, as if SNI's internal record-keeping practices was at the heart of this case. As the other briefs recently filed make clear, there is very limited relevant information that can be culled from SNI's financial records – primarily, SNI's historic license fees. These are well-documented and in fact were analyzed in Mr. Frazee's timely June 1 report.

Finally, DCS relies on Rule 26(e)(1), which provides for supplemental reports. Mr. Frazee's June 29 report was not a supplemental report. It was a new report. And it was based on information provided on February 13. SNI did not withhold anything, Mr. Frazee just started too late.

Respectfully submitted,

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Dated: July 19, 2004

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all the parties in the above cause by serving same to them at their respective business addresses as disclosed by the pleading of record herein on the **19th** day of **July, 2004**, via:

  X   U.S. Mail  
       Hand Delivery

       Facsimile  
       Overnight Mail

  
Theresa Sienko

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# **EXHIBIT A**

1 UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF MICHIGAN  
3 SOUTHERN DIVISION

4 DAIMLERCHRYSLER SERVICES NORTH  
5 AMERICA, LLC f/k/a MERCEDES-BENZ  
6 CREDIT CORPORATION, a Michigan limited  
7 liability company,

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Case No. 02-71871

Hon. Nancy G. Edmunds

10 SUMMIT NATIONAL, INC.,  
11 an Illinois corporation,  
12 Defendant/Counter-Plaintiff.  
13

14 The Deposition of THOMAS FRAZEE taken by Summit  
15 National pursuant to Notice, before Elizabeth A. Tubbert, RPR,  
16 (CSR-4248), a Notary Public within and for the County of  
17 Oakland, (acting in Wayne County), State of Michigan, at The  
18 Westin Detroit Metropolitan Airport, 2501 Worldgateway Place,  
19 Romulus, Michigan, on Wednesday, June 30, 2004.

20 APPEARANCES:

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Appearing on behalf of the Plaintiff/Counter-  
Defendant

(APPEARANCES CONTINUED ON PAGE 2.)

1 to you already.

2 Q And those, somewhere in them, contain references to  
3 what? Either because they're the vendor putting out  
4 this information or the purchaser putting out this  
5 information somebody reported something about 1  
6 percent?

7 A Well, those documents give an understanding of how  
8 one of those transaction works, what types of fees  
9 are charged in those transactions and then also  
10 provide specific numbers, for example. So I guess I  
11 would explain it as those documents don't necessarily  
12 say I will charge you 1 percent for this but they  
13 provide the background and perspective to understand  
14 that that's the appropriate number.

15 Q Did you prepare any kind of schedule summarizing any  
16 of those other documents showing what information was  
17 in them?

18 A No.

19 Q Any notes of that?

20 A No.

21 Q How would I be able to reconstruct your process from  
22 beginning to end to know how you got to 1 percent?

23 A It's based on my judgment and it's based on a review  
24 of those documents. So you could read the documents  
25 and interpret the economic relationships between the

1 various entities that are involved.

2 MR. FRANK: I've got to say on this  
3 issue, Jane, as opposed to all the other ones, the  
4 volume of stuff that I got and now his indication  
5 that that's what he looked at to get to 1 percent  
6 makes it impossible for us sitting here -- for to me  
7 to do that. That's why I wanted this stuff earlier.  
8 Because I wanted to know specifically about that  
9 number.

10 Q (By Mr. Frank) How long do you think it --

11 A Those documents were produced to you some time ago.

12 Q Yesterday.

13 A No, these weren't. These are SEC filings that -- my  
14 office did not produce them to you yesterday.

15 Q I got them from Bodman yesterday. That's the  
16 problem.

17 A Okay.

18 Q How long would it take you to go through that box of  
19 documents while we're sitting here, tell me which  
20 ones you looked at and how they got to the 1 percent  
21 number?

22 A I don't know. It would take me some time.

23 Q Okay. We'll talk about later how we'll deal with  
24 that.

25 Are you comfortable that 1 percent is an



1 accurate figure?

2 A I think it's a reasonable estimation. In fact, it  
3 may be even a little bit high.

4 Q But you were comfortable enough to put it onto your  
5 report; right?

6 A Yes.

7 Q The information at the bottom of Exhibit D which are  
8 the (A), (B), (C), those were provided to you by  
9 somebody else; correct? You didn't do that analysis?

10 A I believe that this was provided as part of maybe one  
11 of the affidavits that was filed in the case in terms  
12 of the -- for instance, number of programs, line of  
13 code dollar investment. Those were provided as part  
14 of one of the affidavits. I don't recall whose.

15 Q If I understand right, you averaged those three  
16 numbers; correct?

17 A No, I don't think we averaged them. I believe we  
18 just looked at them in aggregate. I don't remember  
19 exactly how the mathematical conclusion of 2 percent  
20 was reached.

21 Q That was my next question. If you averaged it, it  
22 comes to about 2, because you have 6.53 divided by 3.  
23 So how did you get to 2 instead of some other number?

24 A Like I say, I don't recall the exact -- whether there  
25 was a precise mathematical calculation. My answer to